IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

LORI KING,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No.: 3:11-CV-00068**
	)	
CAPITAL ONE BANK (USA), N.A.,	)	
	)	
and	)	
	)	
INCHARGE DEBT SOLUTIONS,	)	
	)	
Defendants.	)	
	)	

CAPITAL ONE'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFF'S OPPOSITION TO CAPITAL ONE'S MOTION TO DISMISS

Defendant Capital One Bank (USA), N.A. ("Capital One"), by counsel, respectfully submits this response brief in opposition to Plaintiff's Request for Judicial Notice in Support of Plaintiff's Opposition to Capital One's Motion to Dismiss ("Request for Judicial Notice"). Plaintiff requests that the Court take judicial notice of the settlement in *In re Currency Conversion Fee Antitrust Litigation*, No. 1:01-md-01409-WHP (S.D.N.Y. 2010) ("CCF"), but she does not state explicitly why the Court should take judicial notice. Presumably, Plaintiff wishes to contend the settlement undermines Capital One's argument that the Court should compel arbitration. The CCF settlement, however, is irrelevant to this matter because that settlement only applies to Capital One's enforcement of arbitration clauses contained in customer cardholder agreements, not agreements such as the Client Agreement Capital One and InCharge Debt Solutions, Inc. ("InCharge") contend Plaintiff entered into with InCharge.

Plaintiff's Request for Judicial Notice incompletely cites the provisions of the Final Judgment and Order of Dismissal in the CCF matter and fails to cite to the actual settlement agreement with Capital One, which is publically available and makes clear that the settlement applies only to cardholder agreement arbitration clauses. In the Final Judgment and Order of Dismissal attached as Exhibit A to Plaintiff's Request for Judicial Notice, the Southern District of New York stated that it "finally approves the Settlement Agreements" with the defendants in that matter, including Capital One, which contained a "bar on seeking to enforce the Arbitration Clause or Class Action Waiver Clause in any of the Settling Defendants' existing or pre-existing United States Cardholder Agreements." Pl.'s Req. Judicial Notice, Ex. A, ¶ 7.

The Stipulation and Settlement Agreement with Capital One Bank (USA), N.A. and Capital One, N.A. ("Settlement Agreement"), attached as Exhibit A, defines "United States Cardholder Agreement" as "the terms applicable between an issuer and the holder of a Consumer/Small Business Credit Card when (i) the issuing bank is based in the United States, and (ii) the terms are under United States law or the laws of one of the states of the United States, and (iii) the Credit Card is issued in the United States." Ex. A, at§ 2(ff).

Moreover, Section 3 of the Settlement Agreement states, in relevant part, that Capital One will:

> (a) . . . remove any and all Arbitration Clauses and the Class Action Waiver Clauses from its United States Cardholder Agreements . . . .
>
> (b) . . . not restore or otherwise insert into its United States Cardholder Agreements either an Arbitration Clause or a Class Action Waiver Clause within three and one half (3.5) years following January 1, 2010 . . . .

> (c) . . . not seek to enforce an Arbitration Clause or Class Action Waiver Clause against a member of the Settlement Class based on currently existing or pre-existing United States Cardholder Agreements, except [in a few listed situations] . . . .
>
> (d) . . . not contract, combine, or conspire with any other credit card issuer regarding the re-imposition or re-adoption of an Arbitration Clause or Class Action Waiver Clause . . . .

Id. at § 3(a)-(d).

As previously stated, the arbitration clause at issue in this case is not contained within a United States Cardholder Agreement according to the definition of that term in the Settlement Agreement. Instead, it is contained within the Client Agreement between InCharge and Plaintiff, as explained in Capital One's Memorandum in Support of its Motion to Dismiss and Stay. Capital One's Mem. Supp. Mot. Dismiss 3-4. As a result, Capital One is not violating the Settlement Agreement by arguing that Plaintiff is equitably estopped from avoiding arbitration with Capital One should the Court find Plaintiff entered into the Client Agreement with InCharge and enforce the arbitration clause found within it.

For these reasons, Capital One respectfully requests that the Court decline to take judicial notice of the Settlement Agreement reached by Capital One in *In re Currency Conversion Fee Antitrust Litigation*.

Dated: October 2, 2012

Respectfully submitted,

CAPITAL ONE BANK (USA), N.A.

By Counsel

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CERTIFICATE OF SERVICE

I certify that on October 2, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/EF system, which will send notification of the filing to the following counsel for record:

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I further hereby certify that on October 2, 2012, I served a true copy of the foregoing by electronic mail upon:

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